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90-1504

Supreme Court, U.S.
FILED
MAR 28 1991
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

1990 - 1991 TERM

DIANE G. WARNER,
Respondent,
Plaintiff-Appellant,
Cross-Appellee.

v.

PIERCE COUNTY DISTRICT COURT PROBATION OFFICE, ET AL.
Petitioner,
Defendants-Appellees,
Cross-Appellants.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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A. QUESTIONS PRESENTED:

1) Do allegations regarding a public official's motivation strip the qualified immunity protections enunciated in Harlow v. Fitzgerald, 457 U.S. 800, 815-818, 73 L.Ed.2d 396, 408-410, 102 S.Ct. 2727 (1982), by spawning questions of fact whether lawful actions are subjectively the product of an unlawful motive to suppress or retaliate against the exercise of First Amendment rights?

2) At what threshold are First Amendment retaliation claims ripe for adjudication pursuant to 42 U.S.C. § 1983?

B. LIST OF ALL PARTIES TO THE PROCEEDING:

Petitioners: Pierce County District Court Probation Office; Elaine McNally, Director of Pierce County District Court Probation Office, in her official capacity, and as an individual, and as part of the marital community with Terry Schmid, and Pierce County, a municipal corporation and political subdivision of the State of Washington.

Respondents: Diane G. Warner

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I. **OPINIONS BELOW**.

Unpublished opinion of the United States Court of Appeals for the 9th Circuit in Poole, et al. v. Pierce County District Court Probation Office, et al. in CA No. 89-35004, 89-35041, filed August 9, 1990. See Appendix, page 1; 9th Circuit Order Denying Rehearing and Rehearing En Banc CA No. 89-35004/35041. See Appendix, page 28.

II. **JURISDICTION**.

The United States District Court for the Western District of Washington issued an Order of Dismissal, without prejudice on December 8, 1988. See Appendix, page 26. The Order denied Defendant's motion for summary judgment on the issue of qualified immunity. The 9th Circuit affirmed the lower court's ruling on the issue of qualified

immunity, reversed the dismissal without prejudice and on August 9, 1990, remanded for trial. Petitioner's Petition for Rehearing and Rehearing en banc was denied January 8, 1991.

United States Supreme Court jurisdiction is conferred by 28 USC § 1254(1).

This Court has noted, that qualified immunity "is an **immunity from suit** rather than a mere defense to liability . . . ." Mitchell v. Forsyth, 472 U.S. 511, 526-29, 86 L.Ed.2d 411, 425-27, 105 S.Ct. 2806, 2816 (1985). (Emphasis in original). A "district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 USC §1291 notwithstanding the absence of a

final judgment." Id.

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

A. United States Constitution Amendment One:

AMENDMENT I

FREEDOM OF RELIGION, OF SPEECH, AND OF THE PRESS. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

B. 42 USC § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered

to be a statute of the District of Columbia.

IV. **STATEMENT OF THE CASE**.

A municipal probation officer dissatisfied with her employment and her immediate supervisor, the Probation Department Director, brought suit. The plaintiff has not been fired, transferred, demoted, suspended, reprimanded, or otherwise had any reduction in her status or income, denied pay increases, job benefits or requests. Plaintiff filed her lawsuit 122 days after the conclusion of a previous successful lawsuit.

Plaintiff asserts that she received "nitpicking" criticisms on four of eight cases audited by the department director in a routine semi-annual audit, that the number of jail house interviews that she

was assigned to do had increased and that she was not warmly received by her co-workers since filing the prior lawsuit, that she was reviewed differently than her co-workers and that a file of her correspondence with defendants was set up after she filed this suit.

The plaintiff's physician alleged by deposition that plaintiff had experienced an acute stress reaction which plaintiff attributed to her working conditions. Plaintiff believes her department director is watching her closely so that adverse employment action may be taken against her at some future date in retaliation for having successfully brought a prior lawsuit. Defendants denied any intent to retaliate or that plaintiff was treated

differently from other employees.

Defendants moved for summary judgment on the grounds, inter alia, that the case was not ripe for adjudication, the plaintiffs' had failed to state a cause of action and the probation department director was entitled to qualified immunity. The District Court dismissed the plaintiff's claim without prejudice presumably on a ripeness grounds and denied sub silentio defendant's motion for qualified immunity and dismissal for failure to state a claim. Appendix, page 28.

V. **REASONS FOR GRANTING PETITION.**

Connick v. Myers, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983), establishes a threshold for judicial scrutiny by excluding an employee's speech on matters of purely personal

interest from actionable First Amendment claims. Pursuant to Connick if a government employee alleged wrongful termination because she had complained about her evaluation, receipt of department or meeting minutes, her assignments, co-workers being unfriendly to her, meetings starting on time when she was late, being advised of office policies allegedly implemented without her knowledge with no other disciplinary action taken, her employer establishing a litigation file containing correspondence between her and defendants after suit was filed, even if true, her conduct would not rise to the level of protected speech and the case would be dismissed. However, by alleging that all of those things were done with an unarticulated and unproven

motivation to retaliate against or chill the exercise of First Amendment rights, an employee who was not fired, transferred, demoted, suspended, reprimanded can force the same facts to trial under the 9th Circuit's view of the law. That result appears wrong. It hands disgruntled or malevolent employees a powerful weapon to disrupt and torment officials trying to run government offices.

The issue of ripeness in governmental employees' First Amendment retaliation suits involves an important question of federal law that should be settled by this Court. That question can be answered by this Court addressing the "mixed motive" qualified immunity issue submitted.

The Court should settle the split

among the circuits on when a public official must stand trial in a "mixed motive" First Amendment case. Some circuits have held that where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for a pretrial judgment based upon a showing of objective reasonableness of the defendant's action, then the plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. That is, some direct evidence that the official's actions were improperly motivated must be produced if the case is to proceed to trial. Siegert v. Gilley, 895 F.2d 797, 801-802 (D.C. Cir. 1990) cert. pending.

In Tubbesing v. Arnold, 742 F.2d 401 (8th Cir. 1984), the court held that disputed factual issues concerning malice are irrelevant.

> Since whether the board members are entitled to qualified immunity depends only upon the 'objective reasonableness' of their conduct, disputed factual issues concerning malice, to which the district court referred in denying the summary judgment motion are irrelevant to the determination of qualified immunity.

Tubbesing v. Arnold, 742 F.2d 401 (8th Cir. 1984). See also Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983) (En Banc), cert. denied 464 U.S. 918.

Here, the 9th Circuit has rejected this approach and in Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987).

The Supreme Court described Harlow v. Fitzgerald, 457 U.S. 800. 73 L.Ed.2d

396, 102 S.Ct. 2727 (1982) as purging qualified immunity analysis of its subjective components, Mitchell v. Forsyth, 472 U.S. 511, 517, 86 L.Ed.2d 411, 419, 105 S.Ct. 208, 2811 (1985); and as rejecting any inquiry into the state of mind of the official in favor of a wholly objective standard. Davis v. Scherer, 468 U.S. 183, 191, 104 S.Ct. 3012, 3018, 82 L.Ed.2d 139, 147 (1984).

However, Justice Brennan commented in Rutan v. Republican Party of Illinois, _____ U.S. _____, 111 L.Ed.2d 52, 67, 110 S.Ct. 2729, n.8 (1990):

> Moreover, the First Amendment, as the Court below noted, already protects state employees not only from patronage dismissals but 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.'

That slice of gratis dictum opens the floodgates for federal litigation running the gamut from: "My boss spoke cross to me," to "the office carpet color was chosen to annoy me." This petition addresses when those claims may be litigated.

This court rejected attempting to divine the motivation behind a governmental actor's objectively lawful actions:

> Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability by simply alleging violation of extremely abstract rights. Harlow would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy 'the balance that our cases strike between the interest in vindication of citizens' constitutional rights and in public officials' effective

> performance of their duties, by making it impossible for officials reasonably [to] anticipate when their conduct may give rise to liability for damages.'

Anderson v. Creighton, 483 U.S. 635, 639, 97 L.Ed.2d 523, 530, 107 S.Ct. 3034, 3039 (1987).

The 9th Circuit focused upon the alleged injuries suffered by plaintiff in evaluating this qualified immunity claim, as opposed to, analyzing the objective acts of the defendant. That inquiry circumvents the analysis required for both qualified immunity and ripeness.

VI. **CONCLUSION**.

Grant Certiorari to articulate qualified immunity standards in "mixed motive" First Amendment cases and when the public employee's "unbirthday" creates a justiciable controversy.

Respectfully submitted this 20th day of March, 1991.

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APPENDIX

(i) Memorandum Opinion of Ninth Circuit, Pages 15-25

(ii) Order of Dismissal of District Court for Western District of Washington, pages 26-27.

(iii) Order Denying Rehearing Filed January 8, 1991, pages 28-29.

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENDA J. POOLE; DIANE G. WARNER,	)	CA NO. 89-35004, 89-35041
Plaintiffs-Appellants/ Cross-Appellees,	)	DC NO. 87-301-T
vs.	)	
	)	MEMORANDUM[1]*
PIERCE COUNTY DISTRICT COURT PROBATION OFFICE; ELAINE M. McNALLY; PIERCE COUNTY, WASHINGTON; PIERCE COUNTY PROSECUTOR'S OFFICE,	)	
Defendants-Appellees/ Cross-Appellants.	)	

Appeal from the United States District Court for the Western District of Washington - Jack E. Tanner, District Judge, Presiding
Argued and Submitted December 8, 1989 - Seattle, Washington

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

BEFORE: CANBY, WIGGINS AND FERNANDEZ, CIRCUIT JUDGES.

Plaintiff Diane Warner, a county probation officer, appeals from the district court's dismissal, without prejudice, of her § 1983 suit against the probation department and Elaine McNally, her immediate supervisor. The defendants cross-appeal from the denial of their motion for summary judgment. We reverse the district court's dismissal of Warner's suit, and affirm its denial of the defendants' summary judgment motion.

A. Dismissal without prejudice: ripeness

The district court gave no reason for its decision to dismiss Warner's complaint; it appears, however, that ripeness was the court's primary

concern.[2] Having reviewed the issue de novo, see Herrington v. County of Sonoma, 857 F.2d 567, 568 (9th Cir.), cert. denied, 109 S.Ct. 1559 (1989), we conclude that Warner's action was ripe for adjudication.

The defendants argue that Warner's claims are not ripe because she has not yet suffered any injury and asserts only speculative fears about what might happen in the future. Warner, however, has alleged specific injuries that have occurred already. She claims that she has been harassed, intimidated and

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[2] The defendants' papers in support of its motion to reconsider, which were filed at the invitation of the district judge after he made his thinking known at the pretrial conference, focused on the ripeness issue. Further, both the earlier summary judgment motions and the defendants' brief on appeal, emphasize the ripeness point.

treated unfairly since filing an earlier suit for infringement of her first amendment right to freedom of expression. ("Case I"). More specifically, she contends that McNally and the department have assigned her to do interviews at distant locations, scrutinized her attendance at classes and her contact with clerical staff (while not doing so for other employees), denied her information necessary to do her assigned work, and encouraged other employees to adopt a hostile attitude toward her. Moreover, she has offered evidence of injury in the form of deposition testimony by her physician that she suffers from an "acute anxiety type illness" as a result of her employment situation.

In light of these allegations, it

is difficult to find much merit in the defendants' position. Their reliance upon Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir. 1984), is misplaced. In Andrade, the alleged injury was loss of employment, and the court upheld dismissal because the plaintiffs had not been discharged, and loss of employment was merely hypothetical at that point. See, 729 F.2d at 1481. Warner's alleged injuries, of course, are not hypothetical.

The defendants also appear to urge that Warner's claims are not ripe because she did not avail herself of the department's administrative grievance procedure. There was, however, no requirement that Warner seek administrative redress before bringing a § 1983 action. See Clark v. Yosemite

Community College District, 785 F.2d 781, 790-91 (9th Cir. 1986) (plaintiff need not first resort to state remedies before filing § 1983 action for infringement of first amendment right of association).

Finally, there is some indication that the district Court may have considered Warner's claims not ripe because they depend upon the ultimate resolution of Case I, which at present is on appeal to this Court. This position depends upon an erroneous conception of Warner's action. Warner asserts in this case that McNally and the department subjected her to harassment and other unfair treatment because she sought to vindicate her first amendment rights in Case I. This court has held recently that such a

claim of retaliation is well within the scope of § 1983. Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314-15 (9th Cir. 1989) ("Deliberate retaliation by state actors against an individual's exercise of [the right of access to the courts] is actionable under section 1983.") Thus, Warner's allegations in this case establish a basis for § 1983 relief that is independent from that of Case I. The ultimate outcome of her first amendment claim in Case I is irrelevant to the basis of her claim in this case.

B. Denial of defendants' summary judgment motion

The defendants argue that the district court should have granted their summary judgment motions and dismissed Warner's claims with prejudice. Having

reviewed this issue de novo. see Kruso v. International Telephone & Telegraph Corp., 872 F.2d 1416, 1421 (9th Cir.), cert. denied, 58 U.S.L.W. 3801 (U.S. June 18, 1990), we conclude that the district court properly denied summary judgment.

The defendants contend first that Warner's claim against the department fails as a matter of law because Warner has not demonstrated any official custom or policy that violated her constitutional rights. They allude to an ordinance that places policy-making authority over hiring and firing in a three-member committee (which includes McNally). Contrary to what this reference implies about Warner's allegations, she claims that she suffered retaliation due to the way in

which McNally operated the department, rather than in the hiring and firing decisions themselves. Considering the fact that McNally was the Director of Probation, it is reasonable to assume that she has policy making authority when it came to the daily operations of the Probation Office. Because defendants have not shown that she lacked that authority, summary judgment would have been inappropriate.

The defendants also argue that the district court should have dismissed Warner's claims against McNally because McNally is entitled to qualified immunity. The defendants acknowledge that qualified immunity would not protect McNally from liability for violating a "clearly established" constitutional right. See e.g.,

Mitchell v. Forsyth, 472 U.S. 511, 528 (1985). They urge, however, that Warner claims infringement of a right to express "dissatisfaction with the way [her] department is run," and that this is not a clearly established right. See Appellee's Brief #1 at 25-26.

This argument misconceives Warner's claim. Her suit alleges that McNally subjected her to harassment in retaliation for seeking to vindicate her right to free speech via Case I. The right to resort to the courts without retaliation is a long-standing principle, derived from the first amendment. See, e.g., Soranno's Gasco, Inc., 874 F.2d at 1314 ("The right of access to the courts is subsumed under the first amendment right to petition the government for redress of

grievances." (citing cases)).

Furthermore, we have recognized for some time that the government violates the first amendment rights of its employees by retaliating against them for exercising those rights, even if the retaliation is short of discharge. See Rutan v. Republican Party of Illinois, 58 U.S.L.W. 4872, 4875 & n.8 (U.S. June 21, 1990); Allen v. Scribner, 812 F.2d 426, 434 (9th Cir. 1987).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Defendants-Appellees/Cross-Appellants to pay costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DIANE G. WARNER, Plaintiff, vs. PIERCE COUNTY DISTRICT COURT PROBATION OFFICE, et al.,	)	NO. C87-301T ORDER

THIS MATTER comes on before the above-entitled Court upon Defendants' Motion for Reconsideration.

Having considered the entirety of the records and file herein and in accordance with pretrial conference discussions with counsel and a reconsideration of Defendants' Summary Judgment Motion, it is hereby

ORDERED that Plaintiff Warner's claims against Defendants McNally and the Pierce County District Court

Probation Office are DISMISSED without prejudice.

The clerk of the court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 8th day of December, 1988.

/S/ JACK E. TANNER
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENDA J. POOLE; DIANE G. WARNER,	)	CA NO. 89-35004, 89-35041
Plaintiffs-Appellants/ Cross-Appellees,	)	DC NO. 87-301-T
vs.	)	
	)	ORDER
PIERCE COUNTY DISTRICT COURT PROBATION OFFICE; ELAINE M. McNALLY; PIERCE COUNTY, WASHINGTON; PIERCE COUNTY PROSECUTOR'S OFFICE,	)	
Defendants-Appellees/ Cross-Appellants.	)	

BEFORE: CANBY, WIGGINS AND FERNANDEZ, CIRCUIT JUDGES.

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a

vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.